

In 2002, the ICTJ addressed members of the Turkish Armenian Reconciliation Commission (TARC) on questions of reconciliation and transitional justice. Thereafter the TARC officially requested that the ICTJ should facilitate the drafting of a legal memorandum on the applicability of the UN Convention on the Prevention and Punishment of the Crime of Genocide to events which occurred during the early twentieth century. The memorandum was drafted by independent legal counsel and not by the ICTJ. The memorandum is a legal, not a factual or historical, analysis.

**THE APPLICABILITY OF THE UNITED NATIONS CONVENTION ON
THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE
TO EVENTS WHICH OCCURRED DURING THE EARLY TWENTIETH
CENTURY**

**LEGAL ANALYSIS PREPARED FOR
THE INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE**

This memorandum was drafted by independent legal counsel based on a request made to the International Center for Transitional Justice ("ICTJ"), on the basis of the Memorandum of Understanding ("MoU") entered into by The Turkish Armenian Reconciliation Commission ("TARC") on July 12, 2002 and presentations by members of TARC on September 10, 2002, seeking an objective and independent legal analysis regarding the applicability of the United Nations ("UN") Convention on the Prevention and Punishment of the Crime of Genocide¹ to events which occurred during the early twentieth century.²

This memorandum is a legal, not a factual or historical, analysis. In deriving the conclusions contained in this memorandum we have attempted to state explicitly whether our conclusion relies on any factual assumptions. Although we have reviewed various accounts of the relevant facts, we have not undertaken any independent factual investigation.

We emphasize further that this memorandum addresses solely the applicability of the Genocide Convention to the Events. It does not purport to address the applicability to the Events of, or the rights or responsibilities of concerned individuals or entities under, any other rubric of international law or the laws of any nation.

¹ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, U.N.G.A. Res. 260, U.N. GAOR, 3rd Sess., 179th Plen. Mtg. at 174, U.N. Doc. A/810 (1948) [hereinafter "Genocide Convention" or the "Convention"].

² We acknowledge disagreement as to the magnitude and scope of these events, their context and intended effect, and the identities and affiliations of their perpetrators. See, e.g., on the one hand, Turkish Foreign Ministry, Ten Questions, Ten Answers: Did 1.5 Million Armenians Die During World War I?, available at <http://www.turkey.org/governmentpolitics/documents/10Q10A.pdf>; and, on the other hand, Armenian National Institute, Genocide FAQ, available at <http://www.armenian-genocide.org/genocidefaq.htm#HowMany>. This memorandum adopts the terminology of TARC reflected in the MoU in referring to these events hereinafter as the "Events."

I. THE GENOCIDE CONVENTION

A. *The International Crime of Genocide*

Article I of the Convention declares genocide to be a crime under international law which signatories will prevent and punish.³ Article II of the Convention provides that:

[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁴

This Article has been imported verbatim into the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia, as well as the new Statute of the International Criminal Court.⁵

³ Genocide Convention, Art. I.

⁴ Id., Art. II.

⁵ See Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, S.C. Res. 955, U.N. SCOR, 3453d Mtg. at 3., U.N. Doc. S/RES/955, Annex (1994), reprinted in 33 I.L.M. 1598, 1602 (1994) [hereinafter "ICTR Statute"]; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704, Annex, reprinted in 32 I.L.M. 1192 (1994) [hereinafter "ICTY Statute"]; Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF. 183/9 (1958), available at <http://www.un.org/icc/index.htm> [hereinafter "ICC Statute"].

Article III clarifies that complicity in genocide and conspiracy, direct and public incitement and attempt to commit genocide, in addition to genocide itself, are punishable.⁶

B. Punishment of Genocide

Article IV of the Convention states that "[p]ersons committing genocide ... shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."⁷ Articles V, VI and VII impose various obligations on States party to the Convention to enact domestic measures aimed at preventing and punishing genocide.⁸ Articles VIII and IX provide mechanisms for States party to the Convention to call upon organs of the UN to take action to prevent and suppress genocide⁹ and to refer disputes concerning the "interpretation, application or fulfillment" of the Convention to the ICJ.¹⁰

The remaining nine articles of the Convention are essentially procedural.¹¹

⁶ Genocide Convention, Art. III. The Convention refers in several instances to "genocide or any of the other acts enumerated in article III" (or words to that effect). *See id.*, Arts. IV, V, VI, VII, VIII and IX. For purposes of convenience, references in this memorandum to the international crime of "genocide" are intended, unless the context clearly indicates otherwise, to encompass genocide and the other acts enumerated in article III of the Genocide Convention.

⁷ *Id.*, Art. IV. While Article IV provides only that "persons" (rather than states) shall be punished for committing genocide, Article IX of the Convention provides that disputes between states party to the Genocide Convention relating to its interpretation, application or fulfillment, "including those relating to the responsibility of a State for genocide," shall be submitted to the International Court of Justice ("ICJ") at the request of any of the parties to the dispute. *Id.*, Art. IX. The ICJ has stated that the reference in Article IV of the Convention to "rulers" or "public officials" "does not exclude any form of State responsibility ... for acts of its organs" and that Article IX's reference to State responsibility may include responsibility for the commission of genocide, as well as responsibility for failure to fulfill the State's obligations to prevent and punish genocide as set forth in Articles V, VI and VII. *See* Int'l Ct. of Justice, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Yugoslavia*), Preliminary Objections (July 11, 1996), available at http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyjudgment/ibhy_ijudgment_19960711_frame.htm, ¶ 32.

⁸ Genocide Convention, Arts. V-VII.

⁹ *Id.*, Art. VIII.

¹⁰ *Id.*, Art. IX.

¹¹ *Id.*, Arts. X-XIX

II. EXECUTIVE SUMMARY OF LEGAL CONCLUSIONS

International law generally prohibits the retroactive application of treaties unless a different intention appears from the treaty or is otherwise established. The Genocide Convention contains no provision mandating its retroactive application. To the contrary, the text of the Convention strongly suggests that it was intended to impose prospective obligations only on the States party to it. Therefore, no legal, financial or territorial claim arising out of the Events could successfully be made against any individual or state under the Convention.

The term genocide, as used in the Convention to describe the international crime of that name, may be applied, however, to many and various events that occurred prior to the entry into force of the Convention. References to genocide as a historical fact are contained in the text of the Convention and its *travaux préparatoires*.

As it has been developed by the International Criminal Court (whose Statute adopts the Convention's definition of genocide), the crime of genocide has four elements: (i) the perpetrator killed one or more persons; (ii) such person or persons belonged to a particular national, ethnical, racial or religious group; (iii) the perpetrator intended to destroy, in whole or in part, that group, as such; and (iv) the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

There are many accounts of the Events, and significant disagreement among them on many issues of fact. Notwithstanding these disagreements, the core facts common to all of the various accounts of the Events we reviewed establish that three of the elements listed above were met: (1) one or more persons were killed; (2) such persons belonged to a particular national, ethnical, racial or religious group; and (3) the conduct took place in the context of a manifest pattern of similar conduct directed against that group. For purposes of assessing whether the Events, viewed collectively, constituted genocide, the only relevant area of disagreement is on whether the Events were perpetrated with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. While this legal memorandum is not intended to definitively resolve particular factual disputes, we believe that the most reasonable conclusion to draw from the various accounts of the Events is that at least some of the perpetrators of the Events knew that the consequence of their actions would be the destruction, in whole or in part, of the Armenians of eastern Anatolia, as such, or acted purposively towards this goal, and, therefore, possessed the requisite genocidal intent. Because the other three elements identified above have been definitively established, the Events, viewed collectively, can thus be said to include all of the elements of the crime of genocide as defined in the Convention, and legal scholars as well as historians, politicians, journalists and other people would be justified in continuing to so describe them.

LEGAL ANALYSIS

III. THE GENOCIDE CONVENTION DOES NOT BY ITS TERMS APPLY TO ACTS THAT OCCURRED PRIOR TO JANUARY 12, 1951.

A. *International law generally prohibits the retroactive application of treaties.*

Article 28 of the Vienna Convention on the Law of Treaties provides that:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.¹²

The Vienna Convention on the Law of Treaties did not itself enter into force until January 27, 1980. However, while the convention "constitute[d] both codification and progressive development of international law..."¹³ at the time it was adopted, "[m]ost provisions of the Vienna Convention ... are declaratory of customary international law."¹⁴ The International Court of Justice has noted the customary status of certain provisions of the Vienna Convention on the Law of Treaties, including Article 62 (termination of a treaty by a fundamental change of circumstances)¹⁵ and Article 60 (termination of a treaty due to material breach)¹⁶. U.S. courts have applied the

¹² Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969), Art. 28 [hereinafter "Vienna Convention on the Law of Treaties"].

¹³ International Law Commission, Reports of the Commission to the General Assembly, [1966] 2 Y.B. Int'l L. Comm'n 169, 177, UN Doc. A/CN.4/SER.A/1966/Add.1.

¹⁴ Marian L. Nash, Contemporary Practice of the United States relating to International Law, 75 Am. J. Int'l L. 142, 147 (1981)(quoting text of a letter dated Sept. 12, 1980 from Roberts B. Owen, Legal Adviser of the U.S. Dep't of State, to Sen. Adlai E. Stevenson, Chairman of the Subcommittee on Science, Technology and Space of the U.S. Senate Committee on Commerce, Science and Transportation).

¹⁵ "This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances." Int'l Ct. of Justice, Fisheries Jurisdiction (U.K. v. Ice.), Jurisdiction of the Court, 1973 I.C.J. 3, 8 (Feb. 2).

¹⁶ "The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject." Legal Consequences for States of the Continued Presence of South Africa in

interpretive provisions of the convention as reflecting customary international law (and therefore US law), despite the fact that the United States has signed but not ratified the Vienna Convention on the Law of Treaties, and officials of the U.S. government have made statements to similar effect.¹⁷

The case law of the International Court of Justice prior to the adoption of the Vienna Convention on the Law of Treaties tends to support the contention that Article 28 codified existing international law. In the *Ambatielos* case, the Court observed:

To accept [the Greek Government's] theory would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier.¹⁸

The Court in the *Ambatielos* case recognized that the States Parties to a treaty could provide for its retroactive application, a position the Permanent Court of International Justice had earlier upheld.¹⁹ The analysis under the Vienna Convention of the Law of Treaties' formulation of the rule therefore turns to whether "a different intention appears from the treaty or is otherwise established" that would permit the Genocide Convention to be applied to acts committed prior to its entry into force.²⁰

Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970 I.C.J. 6, (Jun. 21).

¹⁷ See generally Restatement (Third), Foreign Relations Law III, Introductory Note (1987).

¹⁸ *Ambatielos* Case (Greece v. U.K.), Preliminary Objections, 1952 I.C.J. 27, 40 (July 1).

¹⁹ *Mavrommatis Palestine Concessions* Case, 1924 PCIJ (Ser. A.) No. 2 ("An essential characteristic therefore of Protocol XII [is] that its effects extend to legal situations dating from a time previous to its own existence. If provision were not made in the clauses or the Protocol for the protection of the rights recognized therein as against infringements before the coming into force of that instrument, the Protocol would be ineffective as regards the very period at which the rights in question are most in need of protection.").

²⁰ Vienna Convention on the Law of Treaties, Art. 28.

B. Neither the text nor the travaux preparatoires of the Convention manifest an intention to apply its provisions retroactively.

Pursuant to Article 13, the Convention entered into force on January 12, 1951, the ninetieth day following the date of deposit of the twentieth instrument of ratification with the UN Secretary-General. Subsequent ratifications and accessions became effective for the states submitting them on the ninetieth day following the date of their deposit. As noted above, unless a contrary intention appears, a treaty provision stating that a treaty comes into force on a particular date "must mean all the provisions of the Treaty" come into force on that date.²¹

The text of those provisions of the Convention imposing obligations on States Parties to the Convention almost universally obligate the States Parties to take action in the future. For example, the States Parties "undertake" to prevent and punish the crime of genocide,²² "undertake to enact" the necessary legislation to give effect to the Convention's provisions,²³ and agree that persons charged with genocide "shall be tried" by competent domestic or international tribunals²⁴.

The *travaux preparatoires* of the Convention support the contention that the negotiators understood that they were accepting prospective, not retrospective, obligations on behalf of the States they represented, including the "prevention of future crimes."²⁵ One delegate described the purpose of the Convention as expressing "the peoples' desire to punish all those who, in the future, might be tempted to repeat the appalling crimes that had been committed."²⁶

²¹ Ambatielos Case, *supra* note 18. *See also* Restatement (Third) of the Foreign Relations Law § 322 (1987).

²² Genocide Convention, Art. 1.

²³ *Id.*, Art. 5.

²⁴ *Id.*, Art. 6.

²⁵ Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, p. 13 (Statement of Mr. Morozov) [hereinafter "*Travaux Preparatoires*"]. *See also id.* pp. 41-42 (statement of Mr. Dihigo), p.44 (statement of Mr. Kaeckenbeeck).

²⁶ *Travaux Preparatoires*, p. 30 (statement of Mr. Prochazka). *See also id.* p. 15 (Statement of Mr. Sundaram) ("genocide should be made a punishable crime"), p. 78 (Statement of Mr. Maûrtua)("the concept of genocide was new"), p. 126 (Statement of Mr. Messina)(genocide was "a new crime under international law"), p. 127 (Statement of Mr. Fitzmaurice)("the aim of the convention was to establish the concept of a new crime").

C. Conclusion

The Genocide Convention does not give rise to individual criminal or state responsibility for events which occurred during the early twentieth century or at any time prior to January 12, 1951.

IV. ALTHOUGH THE GENOCIDE CONVENTION DOES NOT GIVE RISE TO STATE OR INDIVIDUAL LIABILITY FOR EVENTS WHICH OCCURRED PRIOR TO JANUARY 12, 1951, THE TERM "GENOCIDE", AS DEFINED IN THE CONVENTION, MAY BE APPLIED TO DESCRIBE SUCH EVENTS.

A. *Scope of this memorandum*

We have been requested to provide our opinion on the "applicability" of the Genocide Convention to the Events. It is beyond the scope of this memorandum to investigate the extent to which the Convention codified existing international law regarding responsibility for genocidal acts, although we note that the International Court of Justice has opined that, at least following its adoption, the "principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."²⁷ Likewise, this memorandum does not address, as beyond the scope of the request to us, the claim raised as early as 1915²⁸ that the Events constituted, when committed, an international crime entailing state and individual criminal responsibility under customary international law.

²⁷ Int'l Ct. of Justice, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion (May 28, 1951), 1951 I.C.J. 15, 23. The ICJ recently confirmed that "the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*." Int'l Ct. of Justice, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (July 11, 1996), 1996 I.C.J. 595, 616.

²⁸ On May 24, 1915 the Allies issued a joint declaration that "[i]n view of these new crimes of Turkey against humanity and civilization, the Allied governments announce publicly ... that they will hold personally responsible ... all members of the Ottoman government and those of their agents who are implicated in such massacres [of Armenians]." See Matthew Lippman, The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later, 15 Ariz. J. Int'l & Comp. L. 415, 416 (1998). The 1919 Report of the Commission on Responsibility of the Authors of the War and on Enforcement of Penalties concluded that the Ottoman Empire's treatment of Armenians in its territory contravened "the established laws and customs of war and the elementary laws of humanity," and declared that Ottoman officials accused of such acts were liable for prosecution. Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, March 29, 1919, reprinted in 14 Am. J. Int'l L. 95, 112-17 (1920). The two U.S. delegates dissented, objecting most strenuously to the criminalization of contraventions of the laws of humanity. The laws of humanity were, they believed, a moral rather than a legal concept, and they felt that the prosecution of individuals before a newly created international court for violation of the ill-defined laws of humanity would constitute retroactive prosecution. Id., at 134-36.

The request to consider the "applicability" of the Convention to the Events does encompass an analysis of whether the term "genocide", as defined in the Convention, may appropriately be applied, (a) as a general matter, to describe events which occurred in the early twentieth century and (b) to describe the Events.

B. Terminological applicability of the term "genocide" to events which occurred during the early twentieth century.

It is clear, from the text of the Convention and related documents and the *travaux préparatoires*, that the term genocide may be applied to events that pre-dated the adoption of the Convention.

The drafters of the Genocide Convention used the term "genocide" to refer to events that pre-dated the adoption of the Convention. Although Rafael Lemkin did not coin the term "genocide" until 1943, the text of the Convention and other writings conclusively establish that he and the other drafters of the Convention understood and used the word genocide to describe acts perpetrated prior to the Convention's adoption.²⁹ The States Parties to the Convention recognize, in the Convention's preamble, that "at all periods of history genocide has inflicted great losses on humanity."³⁰

The *travaux préparatoires* contain numerous references to genocide as a historical fact. The Cuban delegate stated that "[h]istory revealed innumerable examples of genocide ..."³¹, while the Egyptian delegate, in arguing against a direct link between genocide and fascism-nazism, spoke of "instances of genocide [which] were to be found in the far more distant past."³² The British delegate, who had been the chief British prosecutor before the Nuremberg Tribunal, spoke of genocide as "a crime already known in international law, of which history had furnished many examples throughout the

²⁹ Lemkin uses the term to refer, among other things, to "classical examples of wars of extermination in which nations and groups of the population were completely or almost completely destroyed." Examples cited include the destruction of Carthage in 146 B.C.; the destruction of Jerusalem by Titus in 72 A.D.; the religious wars of Islam and the Crusades; the massacres of the Albigenses and the Wladenses; and the siege of Magdeburg in the Thirty Years' War. Raphael Lemkin, *Axis Rule in Occupied Europe* 80 at n. 3 (1944).

³⁰ Genocide Convention, preamble.

³¹ *Travaux Préparatoires*, p. 23 (Statement of Mr. Blanco).

³² *Id.*, p. 500. (Statement of Mr. Raafat).

centuries."³³ The Argentinean delegate referred to genocide as "a crime which, although it had always been known to exist, had only recently been defined."³⁴

Likewise, Resolution 96(I) of the United Nations General Assembly, which was passed unanimously and authorized the drafting of the Convention, refers to "many instances of such crimes of genocide" which "*have occurred* when racial, religious, and other groups have been destroyed, entirely, or in part."³⁵

It is clear from the *travaux preparatoires* that the Committee negotiating the final text considered and rejected text that would have tied the concept of genocide more closely to the actions and motivations of the Nazis,³⁶ on the grounds that the Holocaust was not the first or only instance of genocide in human history.³⁷

C. Applicability of the term "genocide" to the Events.

1. Elements of the Crime of Genocide

While it is not seriously disputed that massacres, deportations and other crimes were committed against Armenian citizens of the Ottoman Empire in the early twentieth century, there is disagreement on certain facts, including the number of people affected and, crucially, the identity and intent of the perpetrators.³⁸

³³ Id., p. 40 (Statement of Sir Hartley Shawcross).

³⁴ Id., p. 28 (Statement of Mr. Bustos Fierro).

³⁵ G.A. Res. 96 (I), U.N. GAOR, 1st Sess., U.N. Doc. A/64/Add.1 (1946) (emphasis added).

³⁶ See Travaux Preparatoires, at p. 9 (Statement of Mr. Bartos), 19 (Statement of Mr. Lachs), id., p. 30 (Statement of Mr. Prochazka) (referring to the relationship between genocide and the doctrines of Nazism, fascism and Japanese imperialism); id., p. 501 (Statement of Mr. Chaumont ("the convention would never have been drafted if it had not been for the crimes committed under the Nazi and fascist regimes")).

³⁷ See Travaux Preparatoires, p. 17 (Statement of Mr. Manini y Ríos)("it was generally known that the nazi and fascist parties went to extremes of genocidal crime, but ... there was no need to include [an explicit] qualification [to that effect] in the convention"), p. 24 (Statement of Mr. Tsien Tai), pp. 489-509, passim. It is clear that Lemkin's awareness of and research into the Events also had an important role in animating his advocacy for the adoption of the Convention. See Samantha Power, "A Problem from Hell:" America and the Age of Genocide 17-20 (2002).

³⁸ Supra note 2.

As a legal matter, to convict a person of the crime of genocide one must establish certain essential elements. In connection with the establishment of the International Criminal Court, the Preparatory Commission for the International Criminal Court has developed an enumeration of four such essential elements, the proof of which would result in a determination that the events in question constituted genocide as defined in ICC Statute (which, as noted above, mirrors the text of the Genocide Convention).³⁹ The four elements of the crime of "genocide by killing" are:

- (i) the perpetrator killed (or caused the death of) one or more persons;
- (ii) such person or persons belonged to a particular national, ethnical, racial or religious group;
- (iii) the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; and
- (iv) the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.⁴⁰

It is important to note that these elements were developed in order to assess the guilt or innocence of individuals alleged to have perpetrated genocide, a task which is well beyond the scope of this memorandum. We have been asked to analyze whether the Convention is applicable to the Events, collectively. This memorandum therefore proceeds to analyze whether the Events constituted genocide as defined in the Convention, using the elements of the crime of genocide outlined above as an analytical tool for this purpose.

2. The Events as genocide within the meaning of the Convention.

There are many and various accounts of the Events, including contemporary newspaper reports,⁴¹ the memoirs of Ottoman⁴² and foreign⁴³ officials and

³⁹ Finalized Draft Text of the Elements of Crimes, Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, U.N. Doc. PCNICC/2000/1/Add.2 (2000), at 6 [hereinafter "Elements of Crimes"]. The analysis set forth herein is limited to the crime of "genocide by killing." In analyzing whether the Events constituted genocide by other means (e.g., "genocide by causing serious bodily or mental harm" or "genocide by deliberately inflicting conditions of life calculated to bring about physical destruction"), one or more additional elements might have to be proved. Id., at 6-8.

⁴⁰ Id., at 6.

Armenian survivors,⁴⁴ reports of judicial decisions,⁴⁵ correspondence and other documents contained in government archives⁴⁶ and the work of eminent historians, beginning with Arnold Toynbee.⁴⁷ The core facts common to all of the various accounts

⁴¹ For example, The New York Times printed numerous articles relating to the Events, which are collected and reprinted in Richard D. Kloian, The Armenian Genocide: News Accounts from the American Press, 1915-1922 (3d ed. 2000).

⁴² See, e.g., Armenian Rebellions and Massacres: Veteran and Eyewitness Accounts in Armenian Issue: Allegations-Facts, available at http://www.kultur.gov.tr/portal/tarih_en.asp?belgeno=159.

⁴³ See, e.g., Armin T. Wegner, Armin T. Wegner and the Armenians in Anatolia, 1915: Images and Testimonies (1996); Stanley Kerr, Lions of Marash: Personal Experiences with American Near East Relief (1973); Henry H. Riggs, Days of Tragedy in Armenia: Personal Experiences in Harpoot, 1915-1917 (1997); Leslie A. Davis, The Slaughterhouse Province: An American Diplomat's Report on the Armenian Genocide of 1915-1917 (1988), Viscount James Bryce and Arnold J. Toynbee (eds.), The Treatment of the Armenians in the Ottoman Empire, 1915-1916 (2d ed. 1972). Often cited as well are the accounts of Henry Morgenthau, the American ambassador to Turkey from 1913 to 1916, who was reported to have frequently and persistently intervened on behalf of the Armenians with Turkish officials and was instrumental in bringing international attention to the Events. See, e.g., Morgenthau Intercedes, N.Y. Times, April 29, 1915, reprinted in Kloian, *supra* note 41, at 10; Laud Our Ambassador, N.Y. Times, Sept. 8, 1915, reprinted in Kloian, *supra* note 41, at 29. Morgenthau included his account of what he termed "the murder of a nation" in his memoirs, published in 1918. Henry Morgenthau, Ambassador Morgenthau's Story (1918), at 301 *et seq.*

⁴⁴ See, e.g., Abraham Hartunian, Neither to Laugh nor to Weep: A Memoir of the Armenian Genocide (2d ed. 1986); John Minassian, Many Hills Yet to Climb: Memoirs of an Armenian Deportee (1986); Donald E. Miller and Lorna Touryan Miller, Survivors: An Oral History of the Armenian Genocide (1993).

⁴⁵ See, e.g., Vahakn Dadrian, Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications, 14 Yale. J. Int'l L. 221, 291-315 (1989).

⁴⁶ For example, documents in the U.S. archives are available in the National Archives and Records Administration, Record Group 59, Decimal Files 867 and 860J. U.K. archives are available in the Public Record Office, Foreign Office Records, Class 371. The Republic of Turkey indicates that the Turkish archives, maintained at the Prime Ministry's State Archives, are open and available to all. See Important Questions And Answers: Is There Access to the Ottoman Archives? Are Documents Related [to] Relocation Concealed? in Armenian Issue: Allegations-Facts, available at http://www.kultur.gov.tr/portal/tarih_en.asp?belgeno=253.

⁴⁷ Supra note 43.

of the facts we have reviewed in the course of preparing this memorandum establish that, in viewing the Events collectively, at least three of the four elements of the crime of genocide identified in Section II.C.1 of this memorandum occurred during the Events. First, one or more persons were killed. Second, such persons belonged to a particular national, ethnical, racial or religious group. Finally, the conduct took place in the context of a manifest pattern of similar conduct directed against that group.

While the accounts we have reviewed reveal some disagreement on the intent or motives that animated the perpetrators of the Events, the overwhelming majority of the accounts conclude that the Events occurred with some level of intent to effect the destruction of the Armenian communities in the eastern provinces of the Ottoman Empire, with many claiming that this was the specific intent of the most senior government officials.⁴⁸

The Turkish government maintains that no direct evidence has been presented demonstrating that any Ottoman official sought the destruction of the Ottoman Armenians.⁴⁹ In light of the frequent references to the participation of Ottoman officials in the Events, we wish to highlight that a finding of genocide does not as a legal matter depend on the participation of state actors. On the contrary, the Genocide Convention confirms that perpetrators of genocide will be punished whether they are "constitutionally responsible rulers, public officials or private individuals."⁵⁰ Thus, it is legally appropriate to maintain that the Events constituted genocide as defined in the Convention on the basis of a conclusion that they were perpetrated with the intent of permanently resolving the

⁴⁸ See e.g. Morgenthau, *supra* note 43; Descendants of Survivors of the Armenian Genocide and the Holocaust, 126 Holocaust Scholars Affirm the Incontestable Fact of the Armenian Genocide and Urge Western Democracies to Officially Recognize It, N.Y. Times, June 9, 2000, at A29 (reproducing a statement "affirming that the World War I Armenian Genocide is an incontestable historical fact"). We note that many Turkish accounts dispute the objectivity and authenticity of these accounts and, in particular, insist that the deportations consisted of preventive measures to relocate certain Armenians who posed a threat, and that most of the killings were the result of inevitable casualties of the war and of banditry (in other words, the Events were animated by political and security-related motives or with ordinary criminal intent, and not with genocidal intent). See, e.g., Ysmet Bynark, Foreword, in Selected Books: Armenians in Ottoman Turkey (Oct. 30, 1995), available at <http://www.mfa.gov.tr/grupe/eg/eg11/02.htm>; Relocation: Attacks on Armenian Convoys and Measures Taken by the Government, in Armenian Issue: Allegations–Facts, available at <http://www.ermenisorumu.gen.tr/english/relocation/measures.html>.

⁴⁹ See Armenian Allegations of Genocide: The Issue and the Facts, at <http://www.turkishembassy.org/governmentpolitics/issuesarmenian.htm/>.

⁵⁰ Genocide Convention, Art. IV.

"Armenian question", whether or not this was the official state policy of the Ottoman Empire.

This memorandum sets forth below certain relevant legal considerations that bear on the resolution of the crucial issue of genocidal intent.

3. Genocidal Intent.

On its face, the Genocide Convention's reference to "intent" sets it apart from other crimes under international law. The ICTR and ICTY Statutes define crimes against humanity, for instance, by referring to acts "committed as part of a widespread and systematic attack" against certain civilian populations.⁵¹ Although it is understood that the actor must engage purposively in the prohibited conduct (such as killing or causing serious harm), there is no explicit reference to the actor's intent with respect to the widespread, systematic character of the attacks.

Genocide, by contrast, requires, at the very least, an awareness on the part of the actor of the discriminatory nature of his actions. While murder in the context of a widespread and systematic attack may constitute a crime against humanity, it cannot meet the legal definition of genocide absent evidence of the perpetrator's intent to kill with the effect of destroying, in whole or in part, a national, ethnic, racial or religious group as such. The scope and level of the requisite intent, however, involve complex and evolving issues of international law.⁵²

The *travaux preparatoires* report debate on the question of the scope and level of intent required to commit genocide.⁵³ The adoption of the words "as such" after the enumeration of protected groups represented a compromise designed to satisfy both the delegates who favored inclusion of a motive and those who thought it counter-productive.⁵⁴ Given this context, the "as such" language is susceptible of both a general

⁵¹ ICTR Statute, supra note 5, Art. 3; ICTY Statute, supra note 5, Art. 4.

⁵² See Payam Akhavan, Contributions of the International Criminal Tribunal for the former Yugoslavia and Rwanda to Developments of Definitions of Crimes Against Humanity and Genocide, 94 Am. Soc'y Int'l L. Proc. 279, 282 (2000); Alexander K.A. Greenawalt, Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation, 99 Colum. L. Rev. 2259, 2278 (1999).

⁵³ *Travaux Preparatoires*, pp. 117-139. The term *dolus specialis* was used to connote this particular intent. It was repeatedly argued that what distinguished genocide from murder was the particular intent to destroy a group; as the Brazilian delegate pointed out, "genocide [is] characterized by the factor of particular intent to destroy a group. In the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the acts described in the convention, that act could still not be called genocide." Id., pp. 81-89.

⁵⁴ *Travaux Preparatoires*, pp. 129-139. See also Greenawalt, supra note 52, at 2278.

and a stricter, motive-based, interpretation. As the delegate from Siam noted, "there were two possible interpretations of the words 'as such'; they might mean 'in that the group is a national, racial, religious, or political group', or 'because the group is a national, racial, religious or political group.'"⁵⁵

The judges of the ICTR and ICTY have, on several occasions, been called upon to consider genocidal intent.⁵⁶ The decisions thus far have held that a genocide conviction requires a showing of a particular intent. The judgments have referred to this intent variously as specific intent, genocidal intent, or *dolus specialis*.⁵⁷ These terms have somewhat divergent meaning in domestic jurisprudence and these decisions have not always been internally consistent in their discussions of intent. Moreover, the decisions have essentially been silent on whether a perpetrator must consciously desire destruction of the group, or whether knowledge that such destruction may ensue in the course of his actions will be sufficient.⁵⁸ We note further that the discussion of the appropriate legal standard for intent is inherently fact-specific and, in light of the factual

⁵⁵ *Travaux Préparatoires*, p. 133. The protected groups identified by the Siamese delegate later changed.

⁵⁶ See, e.g., Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, (Int'l Crim. Trib. Rwanda, Trial Chamber 1, Sept. 2, 1998), available at <http://www.ictr.org/>; Prosecutor v. Clément Kayishema & Obed Ruzindana, Case No. ICTR-95-1-T, Judgment, 1999 WL 33288417 (Int'l Crim. Trib. Rwanda, Trial Chamber II, May 21, 1999); Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-IA-T, Judgment, (Int'l Crim. Trib. Rwanda, Trial Chamber 1, June 7, 2001), available at <http://www.ictr.org/>; Prosecutor v. Goran Jelusic, Case No. ICTY-95-10-A, Appeals Judgment (Int'l Crim. Trib. Former Yugoslavia, Appeals Chamber, July 5, 2001), available at www.un.org/icty/brcko/appeal/judgment/index.htm; Prosecutor v. Sikirica, Case No. ICTY-95-8-T, Judgment, (Int'l Crim. Trib. Former Yugoslavia, Trial Chamber III, September 3, 2001), available at www.un.org/icty/sikirica/judgment/index-e.htm; Prosecutor v. Krstic, Case No. ICTY-98-33, Judgment, (Int'l Crim. Trib. Former Yugoslavia, Trial Chamber 1, Aug. 2, 2001), available at <http://www.un.org/icty/krstic/Trial C1/judgment/index.htm>.

⁵⁷ In a 300-page judgment issued on September 2, 1998, the Trial Chamber of the ICTR found a former Rwandan mayor, Jean Paul Akayesu, guilty of various charges of genocide and crimes against humanity, the first genocide conviction since Nuremberg. Regarding the germane issue of criminal intent, the Trial Chamber said "[g]enocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.'" Prosecutor v. Jean-Paul Akayesu, supra note 56, ¶ 498.

⁵⁸ See, e.g., Prosecutor v. Krstic, supra note 56, ¶ 571.

disputes on this point, we do not express an opinion on the standard that might be applied in any particular determination of whether the Events constituted genocide as defined in the Convention.

D. Conclusion

The crucial issue of genocidal intent is contested, and this legal memorandum is not intended to definitively resolve particular factual disputes. Nonetheless, we believe that the most reasonable conclusion to draw from the various accounts referred to above of the Events is that, notwithstanding the efforts of large numbers of "righteous Turks"⁵⁹ who intervened on behalf of the Armenians, at least some of the perpetrators of the Events knew that the consequence of their actions would be the destruction, in whole or in part, of the Armenians of eastern Anatolia, as such, or acted purposively towards this goal, and, therefore, possessed the requisite genocidal intent. Because the other three elements identified above have been definitively established, the Events, viewed collectively, can thus be said to include all of the elements of the crime of genocide as defined in the Convention, and legal scholars as well as historians, politicians, journalists and other people would be justified in continuing to so describe them.

⁵⁹ Paul Glastris, Armenia's History, Turkey's Dilemma, Wash. Post, March 11, 2001, at B01; Zoryan Institute, Turks Who Saved Armenians: An Introduction (rev. ed.), available at http://www.zoryaninstitute.org/Table_Of_Contents/genocide_docs_turksintro.htm.